

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

JERRY WHATLEY,)	
)	
PLAINTIFF)	
)	
v.)	Civil No. 99-284-B
)	
DIVERSIFIED CORPORATE)	
RESOURCES, INC., ET AL.,)	
)	
DEFENDANTS)	

ORDER ON MOTIONS TO DISMISS

The complaint is **DISMISSED** for lack of subject matter jurisdiction. Jurisdiction is asserted on the basis of diversity of citizenship, 28 U.S.C.A. § 1332, but the amount in controversy does not meet the jurisdictional requirement of \$75,000.

The complaint, growing out of a commercial relationship, alleges specific damages in the amount of \$54,000. The complaint refers to other unenumerated damages, but in responding to the defendants' motion to dismiss, the plaintiff has provided no basis for quantifying them. I see no basis for aggregating the plaintiff's various counts. They all center around a common injury, and the damages are not significantly different, count by count. The plaintiff also argues that because he has chosen to sue for unjust enrichment and *quantum meruit*, he is not bound by the contract price. But these alternative recovery doctrines would not permit him to exceed the contractual limits and, in any event, he has provided

no basis for me to conclude that they would result in a significantly greater recovery. Primarily the plaintiff relies on a claim for punitive damages to bring his claim up to the jurisdictional limit.

The claim for punitive damages, however, requires an underlying tort. See Drinkwater v. Patten Realty Corp., 563 A.2d 772, 776 (Me. 1989).¹ Therefore, the plaintiff's counts for unjust enrichment, *quantum meruit*, breach of contract and third party beneficiary breach of contract will not support the punitive damages claim. The only tort claim is Count V, a claim for tortious interference with a beneficial and advantageous relationship on the basis of "fraud and intimidation."² It is directed against only the defendant Diversified Corporate Resources, Inc., not the other defendants. The fraud charge fails under federal procedural rules, because the plaintiff has failed to comply with Fed. R. Civ. P. 9(b), requiring that

¹ The parties have not decided whether Maine or Massachusetts law applies, but the result is no different. Massachusetts also does not permit a recovery of punitive damages in contract actions. See DeRose v. Putnam Management Co., Inc., 496 N.E.2d 428, 432 (Mass. 1986).

² Count VI, a civil conspiracy claim, is a nonstarter. The Law Court has made clear that a civil conspiracy claim exists only for certain extraordinary circumstances (not present here) like coercion, undue influence or restraint of trade, Cohen v. Bowdoin, 288 A.2d 106, 110 n.5 (Me. 1972), and that otherwise a plaintiff must allege and prove the substantive tort against each defendant as the basis for liability. Id.; Potter, Prescott, Jamieson v. Campbell, 708 A.2d 283, 286 (Me. 1998). The plaintiff has failed to do so here. The same analysis holds under Massachusetts law. In Massachusetts, there are two kinds of civil conspiracy. If there is no independent basis for imposing tort liability, a plaintiff must prove coercion and an unlawful means or purpose. See Neustadt v. Employees' Liability Assurance Corp., 21 N.E.2d 538, 540-41 (Mass. 1939). If there is an independent basis for imposing tort liability as to one of the defendants, a plaintiff may recover through a "joint enterprise" or a "concerted action" theory. See Comerford v. Meier, 19 N.E.2d 711, 713 (Mass. 1939); Kurker v. Hill, 44 Mass.App.Ct. 184, 189, 689 N.E.2d 833, 837 (1998); Stock v. Fife, 13 Mass.App.Ct. 75, 430 N.E.2d 845 (1982). Although the latter theory might permit extension of liability on Count V to the rest of the defendants, it fails with the insufficiency of Count V as pleaded.

the circumstances constituting any fraud be “stated with particularity.” The plaintiff has provided no details of any kind concerning fraud. Rule 9(b)’s “particularity” requirement does not apply to the assertion of “intimidation,” but a complaint must contain some factual allegation on point. See Langadinos v. American Airlines, Inc., 199 F.3d 68, 72-73 (1st Cir. 2000). There is not a single factual allegation in this complaint that shows intimidation.³

With neither fraud nor intimidation, the plaintiff cannot pursue his tort claim for interference with an advantageous relationship. See James v. MacDonald, 712 A.2d 1054, 1057 (Me. 1998). Punitive damages, therefore, are unavailable as a matter of law in this case, and cannot contribute to the amount in controversy. The motions to dismiss are **GRANTED**.

SO ORDERED.

DATED THIS 28TH DAY OF MARCH, 2000.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE

³ Massachusetts law also requires a plaintiff to plead that the defendant’s conduct was wrongful in some way: that the defendant used either improper means or had an improper motive. See United Truck Leasing Corp. v. Geltman, 551 N.E.2d 20 (Mass. 1990). There is no factual allegation in the complaint that demonstrates either an improper means or an improper motive.

U.S. District Court
District of Maine (Bangor)
CIVIL DOCKET FOR CASE #: 99-CV-284

WHATLEY v. DIVERSIFIED CORPORAT, et al
Assigned to: JUDGE D. BROCK HORNBY
Demand: \$0,000
Lead Docket: None
Dkt# in other court: None
Cause: 28:1332 Diversity-Contract Dispute

JERRY WHATLEY
plaintiff

v.

DIVERSIFIED CORPORATE
RESOURCES, INC
defendant

VHI CONSULTING GROUP
defendant

Filed: 12/10/99
Jury demand: Plaintiff
Nature of Suit: 190
Jurisdiction: Diversity

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